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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PAUL C.P. CHENG, Plaintiff And Appellant, v. RICHARD K. CHI, Defendant and Respondent.	A093084 (Contra Costa County Super. Ct. No. C9903187)

Paul C.P. Cheng appeals from a summary judgment in his action seeking a declaration that he is the assignee of his deceased father's interest in a limited partnership of which Richard K. Chi is the general partner. Because there is no triable issue of material fact regarding the father's lack of intent to make a gift of the partnership interest to Cheng, we affirm.

BACKGROUND

Appellant's father, C.S. Cheng, was a wealthy and sophisticated businessman who, among his other business interests, was one of the largest investors in California National Bank (now known as California Pacific Bank). Appellant, also a wealthy and sophisticated businessman, now heads his father's multi-million dollar shipping company. Respondent Richard K. Chi had been C.S. Cheng's business associate and friend since the 1970's. Chi and appellant's father invested in various enterprises,

including the bank, two real estate partnerships, CWC Equity and C&C Equity and a limited partnership named CNB Ltd. (CNB).[1]

CNB was formed at the end of 1993. Until that time, the bank had been owned by two holding companies. The holding companies also owned non-bank assets such as real estate. In 1993, the principal shareholders determined that for regulatory reasons, the holding companies would be dissolved. At the end of 1993, this action was accomplished and the shares of stock of the bank were distributed directly to the individual shareholders. CNB was formed at that time as a limited partnership, to take title to holding company assets other than bank stock.

As a result of the 1993 transaction, C.S. Cheng owned approximately 17 percent of the shares of stock of the bank. C.S. Cheng also owned a 17 percent limited partnership interest in CNB and was a signatory to the CNB limited partnership agreement. Chi is the general partner. Many of the shareholders of the bank do not own an interest in CNB. CNB and the bank have different assets and liabilities.

C.S. Cheng died intestate on February 2, 1995. During this litigation, Chi testified that he first learned that C.S. Cheng had given appellant his stock in the bank and his interests in CWC Equity and C&C Equity after C.S. Cheng's funeral when appellant gave Chi two written assignment forms. Appellant testified that he first learned of the transfers from Chi. Chi and appellant agree that the revelation took place at approximately the time of C.S. Cheng's funeral. The CNB partnership was not mentioned.

The transfer of the other three interests was represented by the written assignments, signed by C.S. Cheng. At his deposition, appellant testified that he had not seen the written assignment forms prior to being shown them at his deposition in this action. The assignment of the bank ownership was dated December 26, 1994, and stated: "The undersigned, C.S. Cheng . . . does hereby transfer and assign all of his right, title

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[1] Chi testified that CNB owned stock in a computer company, participation interests in loans, real estate and other assets.

and interest in and to the California National Bank, and especially his interest therein to his son, Paul Cheng . . . ." There was no form regarding CNB.

Although the parties dispute how they first learned of the transfers of these interests, this factual dispute did not pertain to, and is not material to the alleged transfer of the interest in CNB.

After the elder Cheng's death, appellant presented the bank with stock certificates bearing his father's endorsement. The bank accepted the endorsed certificates and issued new certificates in appellant's name. Appellant's 1996 election of his right of sale of the shares as a dissenting shareholder was discussed in *Cheng v. California Pacific Bank* (1999) 76 Cal.App.4th 274, an earlier dispute between appellant and Chi.

Some time in 1997, after appellant sold his bank shares, he realized that he was receiving partnership K-1 statements from CNB. This was the first time appellant was aware of the existence of the limited partnership. He instructed his attorney to investigate. The investigation disclosed that appellant had received K-1 forms from CNB for the years 1995, 1996 and 1997, following his father's death. Chi told appellant that issuing the K-1 forms in appellant's name was an error. Appellant did not receive a K-1 in 1998.

When asked during his deposition if appellant believed that his father intended to make a gift of the CNB interest, appellant answered: "I don't know. I have no idea." Appellant also testified that he had no written document transferring an interest in the CNB partnership to him. Appellant's father never told him he intended to make a gift to him of the CNB partnership interest. Prior to his conversation with Chi at the time of the funeral, no one had ever told appellant that his father had assigned any assets to him.

In January of 1999, Chi purchased C.S. Cheng's interest in CNB from the estate for $59,000. On August 30, 1999, appellant filed an action against Chi, requesting various forms of relief including a declaration that appellant is the true owner of C.S. Cheng's interest in CNB. Following a ruling on Chi's demurrer and motion to strike, appellant filed a second amended complaint on February 25, 2000, seeking only a

declaration that appellant is the assignee of C.S. Cheng's interest in CNB and is entitled to the related income.

On August 3, 2000, Chi filed a motion for summary judgment based on three arguments. Chi contended that C.S. Cheng was still the owner of the partnership interest in CNB when he died. Chi had discussed estate planning with C.S. Cheng and Cheng had not mentioned a transfer of his CNB interest. Chi stated that there was never an assignment of the CNB interest, relying on the lack of any writing or statement by C.S. Cheng, or anyone else regarding an intent to transfer the CNB interest. Chi also argued that even if appellant had produced evidence of an intent to transfer the partnership interest, the purported gift was ineffective in that no actual transfer occurred prior to C.S. Cheng's death. Finally, Chi asserted rights as a bona fide purchaser of the interest from the estate.

In response, although he admitted there was no written or oral assignment to him of the CNB interest and no other expression of his father's intent, appellant argued that the three years of K-1 statements raised a disputed issue of material fact regarding C.S. Cheng's intent to give that interest to appellant. He also contended that the language of the written assignment of all of C.S. Cheng's "right, title and interest in and to the California National Bank" was sufficient to transfer ownership of the CNB limited partnership interest.

The court filed its order granting the motion for summary judgment, stating that there was no disputed issue as to the fact that appellant's father did not assign or intend to assign his limited partnership interest in CNB to appellant. Judgment was entered on September 26, 2000, and Paul C.P. Cheng appealed.

DISCUSSION

Appellant argues that there are disputed factual issues regarding his father's intent to make an assignment and to deliver the assignment.[2] Appellant was not able to produce

[2] Because we reject appellant's arguments regarding the assignment, we do not reach the argument that the assignment was revoked at death.

any factual opposition to Chi's motion, based as it was on the undisputed facts that C.S. Cheng never signed a written assignment of the CNB interest, he never told appellant he intended to assign the interest, he never told anyone else he intended to assign the interest and appellant's admission that he never knew of the CNB partnership until two years after his father's death. Speculation about intent, when the plain language of the written assignment pertains only to C.S. Cheng's interest in the bank, is not sufficient to overcome the showing made by the motion for summary judgment.[3]

There is No Dispute Regarding C.S. Cheng's Lack of Intent to Assign CNB

Appellant claims that his father made a gift to him of the CNB partnership interest. The elements necessary to establish a completed gift are: "(1) competency of the donor to contract, (2) a voluntary intent on the part of the donor to make a gift, (3) delivery, either actual or symbolical, (4) acceptance, actual or imputed, (5) complete divestment of all control by the donor, and (6) lack of consideration for the gift [citation]." (*Bank of America v. Cottrell* (1962) 201 Cal.App.2d 361, 363.) The element of intent requires an expressed intent to make the gift and execution of the gift by delivery. (*Knight v. Tripp* (1898) 121 Cal. 674, 679.)

Appellant argues that inferences drawn from the evidence he produced in opposition to the motion for summary judgment established the existence of a disputed factual issue as to the existence of an intent to assign the CNB partnership interest. Although he concedes that there was never a written assignment and that his father never told anyone he intended to assign the CNB partnership interest to anyone, appellant argues that his father may have intended to assign that interest by assigning his interest in the bank. Appellant argues that his father's failure to expressly and separately assign the CNB interest can be explained by C.S. Cheng's possible confusion or forgetfulness of the 1993 corporate changes in the ownership structure of the bank that resulted in the creation of CNB as a separate entity.

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[3] The parties argue over whether or not the trial court should properly apply a clear and convincing standard of proof. In light of the opposing evidence, we would affirm the summary judgment under any standard.

Appellant's argument about what his father may have thought or intended is based solely on supposition and surmise. No facts even remotely tend to indicate that C.S. Cheng, a sophisticated businessman, who purportedly executed specific express assignments of some, but not all, of his business interests, somehow forgot about the character or existence of the CNB partnership. The conclusion appellant wishes to draw is based on an absence of facts, rather than on any facts submitted in opposition to the motion for summary judgment.

Appellant fails to distinguish between an inference and an unsupported speculation. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) " 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.' [Citations.]" (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45; *Baker v. Gourley* (2000) 81 Cal.App.4th 1167, 1173-1174 [fact that seal on blood sample for alcohol analysis was broken does not support inference that sample was compromised].)

The trial court was correct in its refusal to accept an argument based solely on speculation. "When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork. [Citation.]" (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.) Appellant failed to carry his burden of demonstrating a disputed issue of material fact as to C.S. Cheng's intent to assign the CNB interest by assigning his interest in the bank.

Actions Taken By Partnership Agents Do Not Evidence C.S. Cheng's Intent

In response to Chi's assertion that there was no gift to appellant because of the absence of the necessary element of delivery of the partnership interest, appellant relies on cases holding that delivery is a question of intent. (*Bank of America v. Cottrell, supra,* 201 Cal.App.2d 361, 363; *Marshall v. Marshall* (1956) 140 Cal.App.2d 475, 479.)

However, those cases involved actual evidence that a delivery took place, with the question being the intent with which the delivery was accomplished. The evidence in this case has no bearing on any action taken by C.S. Cheng. Like the issue of intent to transfer, the issue of delivery requires evidence of C.S. Cheng's intent.

The evidence appellant relies on to show that delivery occurred is the undisputed circumstance that an entry headed: "CNB Ltd. withholding calculations 12/31/95" in the books of CNB showed appellant as an owner and he received partnership K-1 statements for the years 1995-1997.

Appellant's purported evidence of delivery is merely an unexplained entry on the books of CNB. Appellant objected to respondent's attempt to explain the entry and his objection was sustained by the trial court. No evidence supports appellant's contention that this entry in the books was made prior to his father's death. Appellant argues that a notation on the CNB statement dated December 31, 1995 that read: "12/31/94 percentage transfer of shares" and showed "-17.1880%" next to the name C.S. Cheng and "17.1880%" next to appellant's name is evidence that the transfer on the CNB books took place before C.S. Cheng's death. Appellant has presented no evidence purporting to explain the two dates on the statement and admitted he had no knowledge of the date of the transfer. In addition, evidence of action taken by whoever kept CNB's books of account may support an inference as to the intent of the person who made the entry, but not as to any purported intent of C.S. Cheng. There was no evidence indicating C.S. Cheng was ever aware of the entry in the books of CNB.

When asked at his deposition if he knew of any evidence indicating that the document was generated at any time prior to the end of 1995, appellant answered: "I have no idea . . . ." No evidence was produced to support the contention that the book entry was based on any direction from C.S. Cheng. Appellant himself has no knowledge of the matter, and admits that he never even knew of the existence of the CNB partnership until after his father's death. Cases indicating that delivery can occur without the donee's knowledge are irrelevant here, where there is no evidence of either the donor's act or his intent.

Lynch v. Lynch (1932) 124 Cal.App. 454, cited by both parties, but relied on by appellant as support for his claim that the book entry and K-1 forms are evidence of delivery of the interest to him, relates to a transfer of shares of stock on the books of a corporation. But in *Lynch*, the owner of the shares had new share certificates issued in the names of the donees and told the donees that he *intended* to make a gift to them. (*Id.* at pp. 455-456.) The owner admitted that he intended to give away the stock, but desired to retain the right to vote the shares. The issue was whether the transfer of stock on the books of the corporation and issuance of the new share certificates was sufficient to establish a completed gift. The court relied on all of the evidence of the owner's actions as well as on a statutory presumption that a transfer on the books of the corporation and issuance of new shares is a prima facie showing of legal delivery. *Lynch* does not help appellant, as there is neither a presumption nor any evidence of intent in this case.

The entry on the CNB books and the K-1 statements only relate to the partnership record keeper's intent, and say nothing about C.S. Cheng's intent or the delivery of a gift to appellant. Appellant's own testimony established his lack of knowledge of a transfer. The written assignments of other of C.S. Cheng's business interests do not support the speculation that he perhaps intended to transfer a different interest. Unexplained book entries in partnership records are not evidence of C.S. Cheng's intent or actions. (*Denigan v. Hibernia etc. Society* (1899) 127 Cal. 137, 140 [absent evidence of donee's declarations or intent, unexplained possession of savings passbook not evidence of gift].) Summary judgment was appropriate in this case.

CONCLUSION

There is a complete lack of factual support for appellant's speculations as to his father's actions and intent. The summary judgment is affirmed.

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Marchiano, J.

We concur:

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Stein, Acting P.J.

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Swager, J.